UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DISH NETWORK, LLC	)	
	)	
and	)	Case No. 27-CA-131084
	)	
DAVID RABB, an Individual.	)	

BRIEF IN SUPPORT OF RESPONDENT DISH NETWORK LLC'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

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I. INTRODUCTION

This brief supports the exceptions of DISH Network, LLC ("DISH") to the decision of Administrative Law Judge Robert A. Ringler ("ALJ"), dated March 26, 2015. In his opinion, the ALJ found that DISH violated Sections 8(a)(1) of the National Labor Relations Act ("Act") by maintaining an unlawful solicitation policy and disciplining a call center employee, David Rabb, ("Rabb"). In reality, DISH disciplined Rabb because at the end of a sales call, he kept a customer on hold under false pretenses so that he could "take a piss" and avoid the next inbound call. DISH discovered Rabb's misconduct only because Rabb chose to break the rules a mere 15 feet away from management. When confronted by a manager, Rabb dismissively scoffed at the notion that his conduct was wrong. While the ALJ believed that Rabb's unapologetic hubris towards DISH's policies and customers makes for a "stellar demeanor," it unfortunately does not make for a stellar employee. DISH, like any competitive business, would have terminated Rabb for this misconduct regardless of his protected activity, which he had previously engaged in for over a year without incident. These points were lost in the ALJ's decision, which like most outcome-oriented decisions is riddled with errors. Accordingly, Dish excepts to the ALJ's opinion as set forth in this brief and accompanying motion.

II. STATEMENT OF CASE

A. Background

Rabb worked as an inbound sales agent ("ISA") at DISH's Riverfront call center in Littleton, Colorado. R. 23; R. 24.[1] The call center is housed in a former shopping mall. R. 24-25. More than 1,000 employees work at the call center. R. 25. Rabb worked in the sales department taking inbound calls in an attempt to sell DISH services. R. 25. The ISA's job is to take inbound sales calls from potential customers, assess the customer needs, and present a solution in hopes of making a sale. R. 295. Part of the ISA's job is to remain available to receive incoming calls. R. 134-135; 290.

The call center is a hectic place, receiving somewhere in the range of 2,500 calls per day. R. 162; 291. There are approximately 1,000 ISAs working at stations located about four feet from each other. R. 162-163; 290. There are about 350 sales desks where the ISAs work. R. 291. It is an around-the-clock operation, running 365-days a year. R. 163; 291. The call center is "crazy and chaotic" with people constantly on calls. R. 299. Typically, ISAs work 8-hour or 10-hour shifts between the hours of 6:30 AM and 10:00 PM, seven days a week. R. 292.

ISAs are divided into teams, with a "coach" being assigned to each team. R. 292. The role of the coach is to support the ISAs by answering questions and monitoring the ISAs' work. R. 292. Above the coach is the position of inside sales manager. R. 294. Neither the coaches nor inside sales managers issue discipline. R. 294. The general manager directs the sales group. R. 294. Emily Evans ("Evans") is the general manager at the Riverfront call center. R. 294.

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[1] R.__ refers to the page number where the record facts are found. Er. Ex. __ refers to DISH's exhibits admitted at trial and GC Ex. __ refers to the GC's exhibits.

B. The Use of AUX

When ISAs, like Rabb, start a workday, they log-into DISH's system and a CTI tool bar appears on their monitor. R. 34. The tool bar has a number of buttons that correspond to different AUX functions. R. 34. There are a variety of AUX functions including "Ready AUX", "Training AUX", "Break AUX", and "Coaching AUX". R. 35. The AUX functions correspond to the activity in which the ISA is engaged. R. 35-36. In particular, "Coaching AUX" is used to talk with a coach or for other "catchall reasons". R. 35-36. Break AUX is used for the 35 minutes of break time. R. 36. That time may be used for a variety of reasons and may be expanded in order to provide accommodations under the Americans with Disabilities Act. R. 384. DISH tracks AUX usage; however, it does not count lunch breaks as AUX usage. R. 144.

Rabb would sometimes use Coaching AUX rather than Break AUX for using the restroom. R. 98. Rabb explained he would use Coaching AUX rather than Break AUX because "I felt that my break was something that I used for myself to go and get away from the phone and to just relieve myself for a couple, three minutes. I didn't feel that I had to use my break. My bladder accumulated during work and I felt I could purge it." R. 98.

C. The Use of Breaks

ISAs who work an 8-hour shift have 30 minutes of break time, while those on 10-hour shifts have 35 minutes of break time -- all of which can be used in any increment the ISA sees fit and at the ISA's discretion. R. 295-296. In addition, ISAs receive an hour break for lunch. R. 296. ISAs do not have to ask their coach to go to lunch or to go on break. R. 300. ISAs who exceed their lunch breaks or other break time are not usually disciplined, but sometimes there is a discussion between supervisors and an ISA if excessive break time is being used. R. 302.

When an ISA goes on break, including using the restroom, the correct AUX is "Break AUX". R. 302. DISH monitors overall AUX usage, and acceptable amounts change based on how busy the call center is. R. 303. When DISH monitors AUX usage, it monitors Break AUX separately. R. 303-304. It is difficult to monitor AUX abuse unless a coach or supervisor actually observes the ISA engaging in the conduct. R. 304.

D. Call Avoidance

"Call avoidance" occurs when an ISA does something to avoid taking calls. R. 305. Examples of call avoidance are using AUX to avoid receiving calls or staying on a call after the customer hangs-up. R. 305. Call avoidance is a problem for DISH because it irritates customers by making them wait longer and misses opportunities for potential sales calls. R. 306. The inbound sales calls received at call centers like Riverfront result in more than 50% of the new business DISH receives. R. 290. For that reason, DISH takes "call avoidance" seriously.

The Direct Sales Call Experience Expectations document outlines DISH's expectations for ISA's. Er. Ex. 4. This document is presented and explained to all new hires during training conducted by Evans. R. 312. Evans' training also covers AUX use and DISH's "tier violation" system, by which policy violations are graded and factored into ISAs' commission calculations. R. 39, 42, 312. Evans also provides refresher courses on these matters. R. 312. These programs cover call avoidance and the use of silent hold. R. 313.

Rabb received training on the Direct Sales Call Experience Expectations and tier violations on October 18, 2013. R. 133. On the sign-in sheet for training, Rabb marked the page "BS". Er. Ex. 16; R. 138. When questioned about why he signed the page "BS", Rabb denied this meant "bullshit". However, he could provide no colorable reason for signing-in with "BS" rather than his name as all other employees had. R. 138-139.

E. The Use of Mute

There are two ways an ISA can place a customer on hold. The first is Hold AUX, where the customer hears music, and the second is mute or "silent hold," where the customer hears nothing. R. 137. DISH tracks ISAs' use of AUX, so it is advantageous for the ISAs' to use silent hold instead of Hold AUX. R. 137. Evans testified it is appropriate to use mute to ask a question or to clear a throat or sneeze. R. 306. It is also appropriate to potentially use mute to take a short break during a stressful call. R. 306. It is not appropriate, however, to use mute for to use the bathroom and to avoid incoming calls. R. 347.

DISH's Direct Sales Call Experience Expectations document states that "placing a customer on unnecessary hold/mute is a tier III violation." Er. Ex. 4. Rabb testified he believed this meant he was not allowed to place a customer on silent hold for 10-15 minutes. He admitted, however, that he had no discussions on which to base this belief. R. 46.

In February of 2013, DISH issued a new policy reflected in a document called "Top Ten Non-Negotiables". GC Ex. 19. Rabb read the document, including item eight, which states that ISAs can use mute or silent hold only as defined in the communication sent on February 21. R. 121-122; 307-308; Er. Ex. 15. The referenced communication stated that approved uses of mute were: to clear throat or sneeze or to receive an update from a supervisor. R. 309; Er. Ex. 15. DISH issued the change in policy because it had noticed excessive mute time. R. 310. It disseminated the same document on at least two other occasions. Er. Ex. 27-28.

F. Discipline of Employees for Call Avoidance.

Evans is involved in all discipline decisions at the Riverfront Call Center, including discharges involving call avoidance. R. 313. Call avoidance disciplines fall into tier III on DISH's call expectations. R. 313-314. In evaluating the level of discipline for call avoidance, DISH reviews each situation on its own merits. R. 314. Several factors are reviewed, including

the employee's history, behavior, whether they have been involved in call avoidance previously, and how the employee responds to being caught. R. 314.

DISH presented multiple examples of employees discharged for call avoidance at the Riverfront call center. Some of these employees were discharged for small increments of call avoidance and without keeping a customer waiting on silent hold:

Name	Date	Previously Counseled	Incident	Exhibit No.
Melisa Marcum	09-16-13	No	The ISA remained on the line after customer hung up.	7
Eric Nielsen	12-09-13	No	ISA placed outbound sales calls to local phone number and remained on the line without leaving a message 30 times from 11/10/2013 through 12/05/2013. The duration of each call lasted approximately 15 to 20 second in length.	8
Keith Warrick	09-22-14	No	The ISA remained on the line for an additional 49 minutes after the call ended.	9
Lawrence Lewnard	01-03-13	Yes	ISA admitted to using "silent hold" with customers so that it did not impact his AUX percentage. DISH noted "By placing customers on mute, Lawrence takes additional break time that is not measured by his break or AUX metrics above. These unauthorized breaks via silent hold negatively impact the customer experience by placing them on unnecessary hold." This was caught by on-site management. R. 374.	10
Patrick Williams	08-08-13	No	ISA stayed on line with no customer on other end.	11
Justinie Behm	03-13-13	No	ISA remained on a dead air call and did not to release the call per DISH guidelines.	12
Anthony Jones	01-08-12	No	ISA called into a number and stayed on the voice mail system.	13
Samantha Bissell	08-27-13	No	ISA stayed on the line an additional six minutes after customer hung up.	14

While DISH's Quality Assurance or sales integrity teams caught all of these violations except for one, it was Evans and her team at Riverfront who make the decision on what level of discipline should be issued. R. 424.

G. Rabb's Complaints Over Pay Practices

Rabb first discussed his dissatisfaction with DISH's pay practices in November 2012. R. 335. Evans often talked to Rabb about his concerns. R. 336. Rabb sometimes told managers of DISH, including Evans, that DISH was "stealing" his money. R. 159-160; 336. Evans consistently encouraged Rabb to continue to voice his concerns and "come up with potential solutions" to them. R. 336.

Rabb also started having discussions with his co-workers about DISH's pay practices in 2012. R. 59; R.157. He shared these concerns with his fellow workers, his coaches, the sales manager, and the general manager. In 2013, Rabb drafted a letter outlining these collective concerns to present to DISH's Senior Vice President Joe Clayton ("Clayton"). R. 59. Rabb discussed the contents of the letter with other employees, who were supportive of the letter. R. 61. Rabb also discussed the letter with his coach Barry Appelhans ("Appelhans") and Inside Sales Manager Clay Gass ("Gass"). R. 63.2 They agreed that Rabb should send the letter. R. 63.

Rabb relied on Evans to shepherd the letter to Clayton because Rabb did not have Clayton's address. R. 60; GC Ex. 12. According to Rabb, Evans was "instrumental" in Clayton receiving the letter. R. 159. Clayton received the letter on August 23, 2013. GC Ex. 12. The letter states: "I/we are often penalized for issues we do not know until some of our wages are taken, (a questionable practice at best and seemingly illegal in Colorado)". GC. Ex. 12

[2] The record inaccurately spells Mr. Gass' name "Goss" at several points.

After sending the letter to Clayton, Rabb went onto the Colorado Department of Labor's website and filed a complaint. R. 62. Rabb discussed his research with supervisors and his coach. R. 62. After the Colorado Department of Labor dismissed his case, Rabb began looking for legal representation. R. 63-64. This search began in January 2014, and Rabb and another co-worker met with a lawyer on January 30, 2014. R. 64-65. Rabb talked to a number of co-workers about his meeting with counsel. These discussions occurred in work and non-work areas including at Rabb's work station. R. 65.

H. Rabb's Prior Disciplines

In April 2013, Rabb received a final warning for admittedly "milking a call" because DISH considers such conduct to be "call avoidance." R. 88, 171-172; Er. Ex. 18; GC Ex. 11. Such call avoidance works against DISH's interest in having its ISA's ready to take customer calls. It was recommended at the time that DISH terminate Rabb's employment when he received the warning for milking the call; however, Evans reduced the penalty to a final warning because Rabb did not have other similar conduct in the past. R. 340; Er. Ex. 18.

Another incident occurred in January 2014, where Michael Delaney ("Delaney"), General Manager of all DISH call centers, observed Rabb leaving the Platinum Room, which is a room where the top 10% of performers receive access, with a handful of sodas. R. 360. Delaney asked Rabb what he was going to do with the sodas, and Rabb told him he was going to distribute them to his friends. R. 360. This was a problem because the room is only for top performers and giving out the benefit to others takes away the value and incentive of the program. R. 360. Delaney, Evans, and D'Angelo met with Rabb regarding the Platinum Room incident. At first Rabb was disrespectful and rude to Delaney, but he later calmed down. R. 361.

DISH considered formally disciplining Rabb for the Platinum Room incident. R. 361. In fact, Rabb appeared on a list of potential terminations in January 2014 because of this incident.

R. 421; Er. Ex. 17. Ultimately, DISH decided that the conversation with Rabb was enough. R. 361. Evans removed Rabb from the potential termination list shortly thereafter. R. 422. DISH creates the potential termination list as a way to monitor employees who are struggling and to avoid attrition. R. 426.

Rabb received a warning for distributing the name and phone number of his attorney on February 18, 2014. R. 68; GC Ex. 15. He had created three or four post-it notes with his lawyer's contact information on it. R. 165. Rabb distributed these post-it notes to some ISAs. R. 166. The warning was precipitated by at least four employee complaints. R. 337, 364-365. One employee complained that Rabb came up to the employee's desk and gave her the sticky note. R. 365. Rabb received the warning in a meeting with Evans, Appelhans, and Kristen D'Angelo ("D'Angelo"), the human resources representative responsible for the call center.[3] In that meeting, Rabb saw a post-it note with his lawyer's information on Evans' desk. R. 71. The post-it note contained the name and phone number of an attorney, with no other information. R. 72.

Rabb testified that after his warning, he continued to encourage his co-workers to seek legal representation, except he only did it in non-working areas. R. 92. Rabb also contacted employees by text message and phone calls. R. 108. Evans never viewed Rabb's complaints as "ramped up" because they were always constant. R. 337. Based on Rabb's constant complaints, pointed questions, and document requests, Evans had long since assumed that Rabb would exhaust all avenues for resolution. R. 409.

I. Rabb is Counseled Regarding the Correct Procedure for Using the Restroom

On February 28, 2014, an incident occurred where Rabb returned from lunch, logged back into the system and then went into Coaching AUX to use the restroom. R. 119; 148. When

[3] The record inaccurately spells Ms. D'Angelo's first name as "Christine".

Rabb returned from the restroom, Appelhans[4] was at his desk and told him he should have gone to the restroom during his lunch. R. 119. Evans considered this conduct to constitute AUX abuse. R. 342. Management discussed this incident and determined that the Appelhans counseling was sufficient and no further discipline should result. R. 350.

J. Rabb is Observed Using the Restroom with a Customer on Mute

The incident that led to Rabb's discharge occurred on March 4, 2014. According to Rabb, he had gotten to the point in the call where he was conducting a credit check. R. 99. Rabb then testified he told the customer, "Congratulations. Everything looks good. I'm going ... go generate an account number and do some paperwork and I'll be back in just a couple of minutes. I'm going to put you on silent hold." R. 99. Rabb then placed the customer on silent hold and went to the restroom. R. 99.

At the same time, Evans, Appelhans, Gass, and other supervisory employees were in a conference room having a meeting a mere 15 feet from Rabb's raised workstation. R. 343-344. Appelhans noticed Rabb had left his workstation with a customer on mute. R. 345. When an ISA places a customer on silent hold, a red light goes on at the ISA's workstation. R. 156. At the time of his discharge, Rabb's workstation was higher than other ISA's so it could be observed from the meeting room. R. 157.

Evans suggested that Gass go out to see if Rabb needed assistance as Appelhans was "in the meeting." R. 344-346. Gass recalled that he was closer to the door and there were no supervisors on the sales floor. R. 438. It was a common complaint of ISAs that they could not find assistance when they needed it, so it was not unusual to send someone out to Rabb's workstation to see if he needed help. R. 346. In fact, it could happen quite often that managers would stop a meeting to see if an ISA needed help. R. 105; 379-380. Rabb himself would

[4] Applehans was discharged from DISH in the Fall of 2014. R. 398.

occasionally seek assistance from a manager or coach. R. 106. As Raymond Best testified, ISAs would have to track down supervisors for help because often they were not present. R. 198.

As Gass was leaving the conference room, he could observe the red light on Rabb's workstation indicating he was on mute. R. 439. As he approached Rabb's workstation, it was apparent that there was a completed account. R. 439-440. According to Gass, after an account number is generated, the ISA is only on the line for another 30 seconds. R. 440. Despite this, Gass "didn't see [Rabb] anywhere." R. 431. Gass waited a few minutes for Rabb, and when Rabb returned, Gass asked him where he was. R. 440-441. Gass asked Rabb, "are you prolonging calls?" Rabb rudely responded, "No, I went to take a ... piss." R. 346, 441. Gass again asked, "so you were prolonging calls?" Rabb answered "yep, you got it right". R. 441.

Rabb's conduct was problematic to DISH because an account number had already been generated so there was no reason to keep the customer waiting on hold. R. 347, 441. Indeed, after an account number is generated, there is nothing left to do except read two short lines, as confirmed by other witnesses. R. 347, 348.

K. Rabb's Discharge

In considering what level of discipline to impose, DISH considered Rabb's final warning the previous year for "milking a call" and his recent conversation with Appelhans regarding using Break AUX for using the bathroom. R. 350-351. DISH did not consider Rabb's warning for distributing sticky notes because it was not a call avoidance issue. R. 351.

Evans, D'Angelo, Delaney, and other corporate HR representatives were all involved in the decision to discharge Rabb. R. 358. The group held multiple meetings and conversations before discharging Rabb. R. 358. They determined discharge was the appropriate penalty based on how he reacted to Gass, Appelhans telling him the correct procedure for using the restroom just days before, and his prior final warning for "milking a call". R. 348-49, 358-359.

In management's view, it is not a proper use of silent hold to place a customer on mute to use the bathroom. R. 347. The proper usage of mute is to ask a question, for throat clearing or sneezing, or as a sales tool to "give the customer a chance to think and give them a chance to put their thoughts together; maybe when the qualification is returned." R. 347. When being used as a tool in this manner, the best time would be when the qualification is returned, not when the call is completed and an account number is generated. R. 348. Rabb's conduct amounted to call avoidance because he kept a caller on silent hold at the end of a call, when the proper procedure was to end the call and either take another call or use Break Aux to go to the restroom. R. 348.

L. Rabb's Use and Abuse of Silent Hold

Rabb testified on direct examination that in his career he placed a customer on silent hold about 1500 times. R. 100. Rabb testified that he used mute so often to go to the restroom that he developed a "code" for when he was leaving his workstation to use the restroom with a customer on hold. R. 102. According to Rabb, he would say "I'm going to generate an account number", and it would be understood that he had just made a sale and was going to the restroom. R. 102. Rabb testified that both coaches and his co-workers knew about this "code". R. 153. Two ISAs who worked near Rabb, however, did not recall such a "code". R. 246; 266-267; 462.

Rabb testified that when he placed customers on silent hold, he typically did so to catch his breath, talk to a co-worker, or "address something at [his] desk." In other words, out of the estimated 1500 times Rabb placed a customer on silent hold, most of those times he did not leave his desk. R. 154-155. Rabb testified that coaches were sometimes present and aware he had a customer on silent hold, however, by Rabb's own testimony, many of these times the coaches would have observed Rabb at his desk or asking a question. R. 101. Rabb could not recall a percentage of the 1500 times that were used for bathroom breaks. R. 154-155.

Rabb admitted an account number had already been generated for the sale on March 4, but he testified the sale was not completed because he still had to set-up an installation date and that this could take two to three minutes. R. 173. This testimony conflicted, however, with others who testified that an installation date is always set prior to an account number being created. R. 271-272; 440. In any event, Rabb decided it was a convenient time for him to use the restroom. R. 174.

After his discharge, Rabb filed a class action lawsuit against DISH regarding pay practices. R. 124-135; GC Ex. 21.

M. Other Witnesses' Testimony

Several other employees testified during the hearing on January 6 and 7, 2015. Significantly, no employee testified that anyone in management (above the level of "coach") condoned the use of silent hold at the end of phone calls.

Raymond Best ("Best") testified pursuant to subpoena as part of the GC's case. R. 182. Best was an ISA at Riverfront and worked with Rabb and Appelhans. R. 183-184. Best testified that when he was hired he received training on the appropriate use of AUX. R. 185. Best testified he used silent hold because it assisted him while he was having stressful times. R. 191-192. But he would not use silent hold on every call. R. 192. Best would use silent hold as a way to "take a little break before [his] next call", but did not testify that coaches or management approved the use of silent hold in that manner. R. 192. Best did not testify that his coach encouraged him to silent hold as a substitute for a break. He did testify, however, that he once used silent hold to use the restroom "but I was scared to death to do it" and was "worried about getting in trouble." R. 191, 203.

Ann Tallman is a former ISA who testified she used mute to ask a question of a coach. R. 214. Tallman also testified that she found it was often difficult to find a coach when she

needed help. R. 223. According to Tallman, the best time to use mute (which she sometimes used to use the bathroom or get a drink) would be when the system was generating an account number. R. 215. Tallman did not testify that management condoned placing callers on silent hold to take breaks at the end of phones calls.

Charles Welle is an ISA who testified he often used silent mute when he had to find a coach because of a question. R. 240. He infrequently used mute for other reasons, but he doesn't "abuse it." Rather, he uses mute as a tool. R. 242. Welle testified: "if I use [silent hold] to go up to the restroom or bathroom, it is very seldom." R. 242. He testified that coaches are not watching that closely where an ISA goes when they leave their work station. R. 242. He did not testify that anyone in management condoned the use of silent hold at the end of phones calls to take breaks at the end of phones calls.

Jonathan Hughes is a current ISA at the Riverfront call center who has worked there for four years. R. 461. Hughes worked with Rabb for 6 to 12 months, and at one point sat almost next to Rabb. R. 462. Like Welle, Hughes could not recall Rabb having a catch phrase that he would use when using the restroom. R. 462. Hughes' understanding of the use of silent hold is that an ISA may use it to seek clarification on a point or talk to a supervisor. R. 463. Hughes testified ISAs are not allowed to use silent hold to use the restroom or get a soda. R. 463. Rather, the proper procedure for using the restroom is to go into Break AUX. R. 464.

Kenneth Paris is an ISA at the Riverfront call center and has worked there for three and half years. R. 475. Paris' understanding of the use of mute is to clear his throat or to ask a quick question of a supervisor. R. 475. He does not believe it is to be used to go to the restroom. R. 475. Paris testified that the procedure to use the restroom is to use Break AUX. R. 477. In Paris' view, having someone on mute too long is an example of call avoidance. R. 478.

N. The ALJ's decision

The ALJ issued his decision ("Op.") on March 26, 2015. The ALJ found that DISH discharged Rabb because of his protected activity, even though Rabb had been engaged in protected conduct for over a year before his discharge on March 4, 2014. The ALJ deemed DISH's solicitation policy unlawful without considering DISH's work environment and busy sales floor. Finally, the ALJ found that DISH unlawfully disciplined Rabb under its solicitation policy, even though Rabb was disciplined for distributing post-it notes in working areas.

III. QUESTIONS PRESENTED

1. Did the ALJ error in concluding that DISH was motivated to discharge Rabb based on his protected conduct? (Exceptions 1-3)

2. Did the ALJ error in concluding that DISH failed to show that it would have discharged Rabb regardless of his protected activity? (Exceptions 4-16)

3. Did the ALJ error in concluding that DISH maintained an unlawful Solicitation in the Workplace Policy? (Exception 17)

4. Did the ALJ error in concluding that DISH unlawfully warned Rabb for solicitation? (Exceptions 18-19)

Suggested answer to all questions: Yes.

IV. ARGUMENT

A. Legal Standard

Under *Wright Line*, the GC bears the burden of proving that protected conduct was a motivating factor for the employer's adverse employment action. *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). That burden extends to each element of the GC's case: (1) the existence of activity protected by the Act; (2) the employer's knowledge of the protected conduct, (3) the adverse employment action taken against the alleged discriminatee, and (4) the "motivational link, or nexus, between the employee's protected activity and the adverse employment action." *American Gardens*

Management Co., 338 NLRB 644, 645 (2002). The fourth prong of this test may be satisfied by various types of circumstantial evidence, including evidence of temporal connection between protected activity and disparate treatment of employees. *Sawyer of NAPA*, 300 NLRB 131, 150 (1990). "However, an anti-union attitude cannot lightly be inferred onto an employer with a history of good union relations, and mere suspicions of unlawful motivation are insufficient to establish violations of the NLRA." *Asarco, Inc. v. NLRB*, 86 F.3d 1401 (5th Cir. 1996) (citation and internal quotations omitted).

If the GC satisfies its initial burden, the employer may avoid liability by showing "the same action would have taken place even in the absence of the protected conduct." *American Gardens*, 338 NLRB at 645. The employer's burden in this regard "does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence." *Wright Line*, 251 NLRB 1083, 1088 n.11. "[T]he shifting burden merely requires the employer to make out what is actually an affirmative defense." *Id.*

B. The ALJ Erred in Finding that the GC Met Its Burden Under *Wright Line*.

In just five lines of analysis, the ALJ concluded that the GC met its *Wright Line* burden because "Evans bore animus against [protected] activity, when she sought [Rabb]'s firing for breaching the solicitation policy" and "the close timing between Rabb's escalated protected activity and his firing, which occurred within 3 months." (Op. at 12). The ALJ's analysis fails to evidence any real animus or connect it to Rabb's discharge for abusing silent hold.

1. The ALJ's Findings of Animus Are Not Supported by the Record or Connected to the Events Concerning Rabb's Discharge.

Typically, when the GC meets its burden under *Wright Line*, the ALJ is able to identify evidence connecting anti-union animus to the adverse action at issue. *See Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 n.1 (2014) (*Miscimarra*, concurring) (emphasizing that

protected conduct must be a factor "in the employer's decision"). The ALJ could not do that here. Instead, the ALJ manufactured "animus" from an unrelated warning Rabb received in February 2014, which had no bearing on the employer's decision to discharge him for abusing silent hold. The warning was issued after an employee complained that Rabb papered her desk with a post-it note, in violation of Dish's solicitation policy. (R. 68, 337, 364-365; GC Ex. 15). Rabb admitted to distributing several post-it notes. (R. 165-166). After he received the warning, Rabb continued freely to solicit co-workers without distributing notes in working areas. (R. 92). The ALJ erred in finding that this warning demonstrated animus, and erred further in boot-strapping this "animus" to an entirely different decision, which was based on different conduct.

The ALJ's attempt to pin this supposed animus on Evans stretches his tenuous reasoning too far. The record is replete with uncontroverted evidence that Evans, who is only one of several decision-makers, supported Rabb's protected activity. For example:

- Evans reduced Rabb's recommended termination to a final warning when he was disciplined for "milking a call" around April 2013. This was Rabb's first formal warning for call avoidance and it happened after Evans was already aware of his protected conduct. (R. 85, 171-172, 340; GC Ex. 11; Er. Ex. 18).

- Evans removed Rabb from the list of potential terminations in January 2014 after his trespass and insubordination during the Platinum Room incident. (R. 360-361, 421-422; Er. Ex. 17). Again, this was well into Rabb protected activity, and after his complaint to the Colorado Department of Labor.

- Evans heard complaints from Rabb about the very subject of his class action since November 2012. R. 335). She encouraged Rabb to voice his concerns and, according to Rabb, she was "instrumental" in channeling his August 2013 complaint letter to Senior Vice President Joe Clayton. (R. 61, 159, 336).

The ALJ failed to address any of this record evidence, which weighs heavily against any finding of animus. Instead, he seized on Evan's candid testimony that she initially thought Rabb should have been discharged for distributing post-it notes in the work place when at least four

employees personally complained to her about it.[5] That does not establish unlawful animus by DISH or outweigh the above-cited record evidence that the ALJ failed to address.

The ALJ's suspicions as to animus also appear to devolve from improper inferences. First, the ALJ presumed Evan's intent was retaliatory because "she did not explain ... why she considered this single breach of Dish's solicitation policy to be a terminable offense." (Op. at 5). This remark, however, improperly questions Evan's business judgment and places the evidentiary burden on Dish. (*See below* Pt. IV.C.2.b). To develop the fiction that Evan's initial suggestion to discharge Rabb was based on protected activity, rather than papering a co-worker's desk, the ALJ should have cited to the record testimony to that point; but there is none. In the absence of such evidence, it was not incumbent upon Evans to justify her business judgment, nor was it proper for the ALJ to presume her intentions were unlawful.

Second, Evan's initial recommendation to discharge Rabb for disrupting and papering his co-worker's desk proves nothing in the way of his discharge for unrelated conduct. It only exaggerates the gravity of being considered for discharge at Dish. Before Evans "sought to discharge" Rabb, other Dish supervisors "sought to discharge" Rabb for milking a call. Dish also placed Rabb on a list of potential terminations for the Platinum Room incident in January 2014. (R. 360-61, 421-22; Er. Ex. 17). The record plainly shows that Rabb came closer to discharge for his call avoidance and Platinum Room insubordination than he ever did for disrupting the workplace with post-it notes. While Rabb was never discharged for solicitation, the ALJ found Evans' initial suggestion sufficient to overcome her demonstrated lack of animus and taint the

[5] The only "evidence" offered to display Evans' alleged animus was apparently too tenuous for the ALJ to cite. Specifically, Rabb testified that he complained when his co-worker Christy Black tried to raise funds for someone who was injured in a car accident. (R. 167-168; GC Br. at 20). The comparison between Rabb's conduct and Black's conduct is without merit, if not tact. The GC presented no evidence that Ms. Black actively solicited anyone, papered employees' desks, or generated multiple complaints. *Id.* The ALJ did not even reference this transparent attempt to trap DISH in a false comparison, as doing so would make his colorization of Rabb as the victim of "entrapment" look even sketchier by half.

entire group decision-making process for addressing Rabb's repeated abuse of silent hold. DISH excepts to the ALJ's distortion of the record.

2. The Alleged "Close Timing" in This Case is Manufactured.

The only other evidence cited by the ALJ as supporting the first phase of the *Wright Line* analysis is the so-called "close timing" between Rabb's "escalated protected activity" and his termination. (Op. at 12). While temporal proximity between an employee's protected activity and discharge may support an inference of animus in certain circumstances, it does not do so when there is a long history of non-interference in protected activity or blatant misconduct by the employee. *See Taos v. Ski Valley, Inc.*, 332 NLRB 403 (2000) (affirming dismissal of Section 8(a)(3) complaint where employee engaged in protected conduct, including complaints and letters to management, prior to his discharge without interference from employer); *Syracuse Scenery & Stage Lighting Co., Inc.*, 342 NLRB 672 (2004) ("While the employees' union activities and the discharges did occur within a relatively brief time period, so, too, was there a close proximity in time between the employees blatant misconduct and the Respondent's decision to terminate them. Under these circumstances, the factor of timing is too weak a foundation upon which to base a finding of pretext."). Here, DISH has a long history of non-interference in Rabb's protected conduct, and Rabb engaged in blatant misconduct just before his discharge. The ALJ inexplicably failed to consider these factors and the record as a whole.

There are numerous errors with regard to the ALJ's "close timing" analysis. First, the notion of "escalated protected activity" is simply a fiction designed to sever Rabb's 15 month-long chain of protected conduct. It is based on the ALJ's own hindsight and subjective views of Rabb's conduct rather than anything contemporaneously expressed by DISH. This is a significant legal error because "the issue here turns on employer motivation." *Philips Industries, Inc.*, 295 NLRB 717,718 (1989) (emphasis added). The record shows that DISH never viewed

Rabb's protected conduct as "escalating" in the months prior to his termination. R. 337; 409). In fact, DISH's management always assumed Rabb would explore all avenues based on his pointed questions, complaints and requests for documents. R. 409). DISH made no comments, wrote no memos, asked no questions, and expressed no concern with Rabb's protected activity. The ALJ points to no record evidence to support his findings other than DISH's audacious attempt to stop Rabb from disrupting co-workers during working time, which is not protected activity.

Second, there is no logical basis for the ALJ's conclusion that DISH viewed Rabb as engaged in "escalated protected activity" near the time of his discharge because he complained to the Colorado Department of Labor and/or filed his lawsuit. (Op. at 12). In a business setting, "lower level managers" would be more likely to fear the complaint Rabb made to Senior Vice President Joe Clayton in 2013 than his complaints to outside entities. This would be especially true for those managers who, as the ALJ puts it, are "keenly focused on advancing their case." (Op. at 9). On the other hand, if the same lower level managers were comfortable enough to advance Rabb's complaint to upper management, which they were, there would be no reason for them to try to stifle further complaints. Tellingly, no such reason is presented in the record or the ALJ's opinion. All that is left is "mere speculation," which is insufficient and inconsistent with business reality in this case.

Third, there is no legal basis for the ALJ's conclusion that Rabb's escalated protected activity included soliciting co-workers to "join his lawsuit." (Op. at 12). Rabb did not file a collective action under Section 16(b) of the Fair Labor Standards Act. Had he done so, his "solicitation" of other employees may have had an impact on the size of a conditional opt-in class, and ALJ's emphasis on solicitation might make sense. But Rabb filed a class action under Colorado law. In a class action, every co-worker who is allegedly similarly-situated to Rabb

instantly becomes part of a putative class. The size of the putative class changes only if Rabb's co-workers affirmatively opt out of the class or the class is dissolved. These events do not occur until much later in class litigation. The ALJ and GC's emphasis on Rabb's solicitation of co-workers to "join his connected suit" really makes no sense and only exposes their manipulation of the record. (Op. 10).

Fourth, the ALJ's analysis ignores the following undisputed facts: (1) Rabb was engaged in vociferous protected activity for over a year prior to his complaint (*above* Pt. II.G); (2) his supervisors not only tolerated his activity, but encouraged it and hoped that he would "come up with potential solutions" R. 336); (3) his supervisors were unalarmed when Rabb began filing complaints with outside agencies and courts. In fact, they had a hunch he would do that anyway R. 337, 409); (4) they were alarmed, however, was Rabb's repeated abuse of silent hold, his forcing a customer to wait on hold at the end of a call, his decision to do this 15 feet in front of management and his decision to scoff at a supervisor when confronted about it. R. *above* Pt. II.J-K). Rabb admits that he engaged in this conduct, and his decision to do so is not within DISH's control. R. 172-174, 441).

An honest reading of the record shows that Rabb's long line of protected activity ran parallel with his timeline of employment for nearly two years--until his flagrant abuse of silent hold on March 4, 2014. The ALJ's analysis cuts-off 13 months from Rabb's 15 month-long chain of protected activity. It then takes this truncated chain of protected activity, branded as "escalated protected activity," and welds it to Rabb's discharge in order to create the illusion of temporal proximity. This is a manipulation of the record; not a causal connection. It should not be countenanced by the Board.

C. The ALJ Erred in Finding that DISH Did Not Meet Its *Wright Line* Burden to Show It Would Have Discharged Rabb Regardless of Protected Activity

Even if the Board buys the manufactured evidence at the first phase of the *Wright Line* analysis, it should still vacate the ALJ's decision because DISH easily met its burden of showing that it would have discharged Rabb absent any protected conduct. The ALJ's conclusions to the contrary cannot survive because they again skew the record, and also violate legal standards applicable to supervisory status, similarly-situated comparators, substituting business judgment, and *Wright Line* itself.

1. DISH Presented Evidence that It Would Have Terminated Rabb Absent Any Protected Conduct, But the ALJ Ignored It.

The ALJ's decision did not consider or weigh any of the evidence DISH presented in support of its affirmative defense. The record shows Rabb was discharged because he was caught abusing silent hold in the presence of management, and rudely responded that he "went to take a piss" when confronted about his conduct. R. 348-49, 358-59; GC Ex. 18). Rabb's conduct involved misconduct in front of management, rudely interacting with management, lying to a customer about the reason for being placed on hold, lying to the Company about the nature of his hold, and placing the customer on hold at the end of a transaction for no reason other than to avoid the next call and use the restroom. DISH has terminated many other employees for similar conduct. *See above* Pt. II.F; R. 372-375; Exhs. 5-14, (C. Luckner (unnecessary silent hold, willful misinformation to customers); L. Lewnard (unnecessary hold, rude to supervisor); B. Behm (staying on call without a customer); P. Williams (same); S. Bissell (same); K. Baash (same); J. Brown (same and making outbound calls without a customer).

While not all of these employees lied to customers like Rabb did, several avoided calls for similar lengths of time. *Id.* (S. Bissell (6 minutes); K. Baasch (same); P. William (10 minutes). Other employees were found to have spent longer periods of time avoiding calls, but

this is because their conduct was revealed through random, but comprehensive internal audits rather than a flagrant display before management. *See above* Pt. II.F; *R.* 372-375; Exhs. 5-14 (B. Jones (caught by QA or Sales Integrity); C. Luckner (caught by Sales Integrity); J. Behm (caught by QA); J. Brown (same); K. Warrick (same)). These employees' deceptive and evasive conduct, however, is the same as Rabb's, and Rabb's discipline was the same as theirs. In fact, as if addressing Rabb's misconduct, DISH disciplined Mr. Lewnard because "placing customers on mute, takes additional break time that is not measured by his break or AUX metrics. These unauthorized breaks via silent hold negatively impact the customer experience by placing them on unnecessary hold." R. 325-326; Er. Ex. 10). These concerns are the same as those raised by Rabb's admitted misconduct. DISH issued the same discipline to Rabb when he refused to comply with DISH's call avoidance rules, which he previously marked as "BS."

2. The ALJ's Analysis Relies on Fundamental Errors of Law.

Without thoughtfully analyzing any of the above-cited evidence, the ALJ declared that DISH failed to meet its *Wright Line* burden based on six points. None of the ALJ's six points can be reconciled with the record or even basic principles of law. All of them emanate from four fairly egregious errors:

a. *The ALJ Misrepresented the Nature of Rabb's Conduct.*

The ALJ pretended that Rabb was discharged for "using silent hold" during a call instead of using silent hold at the end of a call. These are different types of conduct. Rabb was not discharged for simply placing a caller on silent hold during a call; he was discharged because at the end of a call, he lied to the customer that he had to "generate an account number", and placed the caller on hold for no reason other than to avoid the next call and "take a piss." He was discharged because he engaged in this misconduct just 15 feet away from management (not coaches), to whom he reacted dismissively when confronted about his conduct. These reasons

for Rabb's discharge are not hard to locate in the record. *See* R. 344-349, 358-359, 441. However, they were somehow lost to the ALJ. None of the ALJ's various euphemisms for Rabb's actions adequately describes his conduct. *See* Op. at 6:29-30 ("placing a customer on silent hold") 8:8 ("practice of using silent hold for restroom breaks"); 8:10 & n.23 ("silent hold usage"); 8:21 ("silent hold practices"); 12:10 ("longstanding restroom practices"); 12:25-26 ("using the restroom"); *see also* 12:22-23 (claiming DISH "fire[d] Rabb for using silent hold to use the restroom"); 12 n.34 (claiming Rabb was "fired for solely [*sic*] placing a caller on silent hold").

It appears the ALJ simply generalized Rabb's conduct so that he could deem it similar to conduct considered less egregious by DISH. (Op. 6 n.14; Op. 7 n.20-21; Op. 8 n.24). However, the ALJ is not permitted to subjectively evaluate and weigh employees' conduct against his own standards of conduct. *See Neptco Inc.*, 346 NLRB 18, 20 (2005) (reversing ALJ's opinion where the "analysis proceeds from the erroneous premise that the Human Resource Manager[ ]'s characterization of [the allege discriminates]'s conduct as 'insubordination' would be accurate only if it comported with the judge's view of the common definition of that term"). In *Neptco*, for example, the judge failed to acknowledge that the employer considered wandering away from one's workstation as, and as severely as, insubordination. *Id.* Here, the ALJ failed to acknowledge that DISH considers wandering away from one's workstation with a customer on hold under false pretenses as severely as the above-referenced examples of call avoidance and dishonesty. The ALJ also failed to recognize that DISH considers this conduct differently from the legitimate use of silent hold during a call. The ALJ's failures here are inexplicable, as DISH's opening brief warned about confusing the use of silent hold as a legitimate business tool with the dishonest abuse of silent hold. (Resp. Br. at 1).

b. *The ALJ Supplanted DISH's Business Judgment with His Own*

In euphemizing Rabb's conduct as no big deal, the ALJ improperly supplanted DISH's business judgment with his own. *See Copper River Grill*, 360 NLRB No. 60, slip op. at 19 (2014) (rejecting "no harm, no foul" argument because the Act gives ALJ "no authority to substitute [his] judgment for the Respondent's or to sit as an arbiter of 'fairness' in some abstract sense."). The ALJ went so far as to complain that Rabb should have been warned prior to his discharge (which he was), based on his "somewhat long term." (Op. at 12 n.36). The ALJ may not act as an arbitrator or "personnel manager, supplanting [his] judgment on how to respond to unprotected, insubordinate behavior for those of an employer." *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (2006) (quoting *Epilepsy Fdn. of NE Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001)). The question is not whether DISH acted incorrectly or harshly to Rabb's misconduct; it is whether DISH would have terminated Rabb for his misconduct absent his protected activity. *Id.*; *accord Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000). Answering that question requires an accurate description of Rabb's misconduct from DISH's point of view. That should have been easy here, where Rabb admitted to his misconduct and DISH's reasons for his discharge. The ALJ simply refused to acknowledge them. *See above* Pt. IV.C.2.a; Op. 12 n.34 (claiming Rabb was "fired for solely [*sic*] placing a caller on silent hold").

The most bizarre display of the ALJ's improper business judgment is his insistence that DISH should have disciplined employees who honestly registered their BREAK AUX usage, but exceeded their allotments. The ALJ went so far as to declare that "if Dish were truly concerned with ISAs avoiding their calls, it would also respond to the multitude of ISAs, [sic] who exceed their BREAK AUX allotment." (Op. at 12 n.35). However, "[i]t is not within the province of the Board merely to substitute its judgment for that of the employer as to what constitutes appropriate and reasonable discipline." *Hoffman Fuel Company of Bridgeport*, 309 NLRB 327,

329 (1992). Moreover, DISH does not view excessive BREAK AUX usage as analogous to call avoidance. While DISH acknowledges that excessive BREAK AUX can rise to the level of call avoidance (like absences can rise to the level of job abandonment), it does not always do so (like absences are not always job abandonment). The Board has explained that disparate treatment must be "blatant" in order to support finding a violation of the Act, in that it must involve "a plain failure by the employer or its supervisors or managerial agents to treat equally-situated employees equally." *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998). The ALJ's comparison to excessive BREAK AUX usage does not come close to this standard. It does not even implicate the dishonesty and customer abuse associated with Rabb's misconduct.

For example, in his opinion, the ALJ claims Kenneth Paris should have been disciplined like Rabb because his BREAK AUX usage is "a whopping 121 percent above the reported 35-minute allotment." (Op. 7:21-22). In reality, the "whopping 121 percent" equates to about seven extra minutes of BREAK AUX usage. The ALJ actually believes that Paris' seven minutes of BREAK AUX usage is equivalent to Rabb's lying to the company and keeping a customer on hold under false pretenses to avoid a new call and "take a piss." This reasoning seriously undermines the ALJ's decision.

c. *The ALJ Erred in Analyzing "Similarly-Situated Comparators"*

The ALJ's mischaracterizations of Rabb's conduct and misuse of business judgment taint his efforts to compare of Rabb to similarly-situated comparators. *Hoffman Fuel Company of Bridgeport*, 309 NLRB 327, 329 (1992) (rejecting ALJ's disparate treatment analysis where alleged comparators were not similarly situated). To be similarly situated, employees must have "(1) have dealt with the same supervisor; (2) were subjected to the same work standards; and (3) had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Buhendwa v.*

Univ. of Colorado at Boulder, 214 F. App'x 823, 828 (10th Cir. 2007). In the discharge context, this means that "those who made the termination decision had evidence of [alleged comparators engaging in] violations comparable to the evidence on [the alleged discriminatee]." *Doke v. PPG Indus., Inc.*, 118 F. App'x 366, 369 (10th Cir. 2004).

Here, the employees who were discharged for call avoidance and insubordination are similar to Rabb, who was previously counseled and nearly discharged for "milking a call" (call avoidance), and who violated DISH's policy 15 feet away from management only to rudely state that he "went to take a piss" (insubordination). Additionally, the employees who were terminated for staying on calls after their callers hung-up are similar to Rabb because they engaged in dishonest conduct at the end of their calls in order to avoid taking new calls. (Rabb's conduct of lying to the customer rather than waiting for the customer to hang-up is even worse). These employees were subject to the same decision-makers in management. R. 424). The ALJ ignored most of them and trumped-up others employees' actions based on his own notions of their severity. *See below* Pt. IV.C.3.b.

The GC and ALJ's attempts to liken Rabb to other ISAs who used silent hold without being disciplined are without merit. First, the record does not establish that any ISA engaged in the same flagrant degree of deception or attitude to management upon discovery while using silent hold. Second, these individuals are not similarly situated to Rabb because there is no evidence that the decision-makers were aware of their conduct. *Buhendwa*, 214 F. App'x at 828; *see also Copper River Grill*, 360 NLRB, slip op. at 18-19 (rejecting comparative analysis where there was no evidence management knew of alleged protected activity). This is an important and fundamental distinction that the ALJ missed.

The ALJ's attempt to liken Rabb to employees who exceeded their BREAK AUX usage violates several fundamental principles applicable to a comparative analysis. First, "it was the General Counsel's burden to establish that such similarly situated individuals existed, not the [DISH]'s burden to show that they did not exist." *Pacific Maritime Ass'n*, 321 NLRB 822, 824 n.7 (1992). The ALJ ignored the burden of proof when he blamed DISH for having "no evidence ... [of] discipline[] for exceeding the BREAK AUX cap." (Op. at 7 nn.20-21). He also ignored the burden of proof when he branded Sarah Story as a comparator. Although "the record fails to describe the basis" for her termination, that did not stop her from being styled as someone who was not disciplined for what the ALJ unilaterally deemed excessive BREAK AUX usage. (Op. 9 n.27). When the appropriate burden of proof is applied, the record actually "fails to describe the basis" for Story as a comparator.

Second, the ALJ violated the principle that the party claiming discrimination cannot "pick and choose a person he perceives is a valid comparator who was allegedly treated more favorably, and completely ignore a significant group of comparators who were treated equally or less favorably than he." *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1012 (10th Cir. 2001) (internal quotation and brackets omitted). Here, the ALJ improperly picked and chose among employees whom he thought engaged in the most excessive use of BREAK AUX, but on the whole, DISH's ISAs exceeded their usage by only six%, or about two minutes and more than half did not exceed their BREAK AUX usage, even by a minute. (Op. 25 & n.6).

Third, the ALJ's comparative analysis failed to account for "mitigating circumstances that would distinguish [alleged comparators'] conduct or the employer's treatment of them for it." *Buhendwa*, 214 F. App'x at 828 (10th Cir. 2007). The ALJ just assumed all employees who exceeded their BREAK AUX usage did so without authorization or excuse. This is a grave error

considering that DISH permits employee to exceed BREAK AUX usage as a reasonable accommodation under the Americans with Disabilities Act. R. 384). Again, it was the GC's burden to account for mitigating circumstances as part of his claim that Rabb was treated worse than similarly-situated comparators. That claim has obviously failed.

d. *The ALJ Misrepresented Coaches as "Management"*

The ALJ attempted to portray DISH's coaches as "management" so that he could impute the coaches' alleged knowledge of Rabb's "longstanding restroom practices" to DISH's decision-makers. This backhanded description of coaches as "management" has no basis in fact or law. (Op. 8). There can be no argument to the contrary because the ALJ provided no facts or legal analysis to support his erroneous conclusion. *Id.* The burden to establish supervisory status is on the GC. *See Millard Processing Servs.*, 304 NLRB 770, 771 (1991), *enfd.*, 2 F.3d 258 (8th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994). The GC presented no evidence that coaches perform any Section 2(11) activities, let alone exercise independent judgment in doing so. To the contrary, coaches do not hire, fire, transfer, discipline, promote, assign, schedule, or bear responsibility for directing employees. R. 292-94). Instead, they support the ISAs and provide help with customers, answering questions and "keep[ing] any eye on the day to day." R. 292). Thus, ALJ's references to coaches as supervisors and "management" is a serious misrepresentation and dispositive legal error. (Op. 3, 6).

3. The ALJ's Six Points Contradict the Record and the Law

The fundamental legal errors above corrupt the ALJ's six-point analysis that purports to explain how DISH would not have discharged Rabb for his misconduct. In addition to their lack of legal support, each point fails on the record as well.

a. *The "Longstanding Record" of Placing Customers on Silent Hold*

First, the ALJ found that Rabb "had a longstanding practice of placing customers on silent hold to use the restroom, which was tacitly accepted by his Coaches." (Op. 12). This finding is undermined by the ALJ's misrepresentations of Rabb's conduct. *See above* Pt. C.2.a. Specifically, the "longstanding practice" is based on testimony that (1) Rabb used silent hold on roughly 1,500 calls and (2) had a well-known "code" for using the restroom during a call (i.e. "generating an account number"). (Op. 5 n.11;. Op. 6 n.12). The ALJ does not explain how Rabb's use of silent hold became a "longstanding practice of placing customers on silent hold to use the restroom." (Op. 12). To the contrary, Rabb testified that he used silent hold on roughly 1,500 times, typically catch his breath, talk to a co-worker or "address something at [his] desk." R. 154-155. He also admitted when he used silent hold, he typically did not leave his desk. R. 154-155. Since there are many valid uses for silent hold, including short breaks while a customer becomes qualified, the ALJ's generalized citations to the use of silent hold are unhelpful and misleading. R. 347).

Second, no one agreed with Rabb that the phrase "I'm going to generate an account number" was "code" for using the restroom. In fact, two of Rabb's co-workers, who worked near him, testified that they never hear of this alleged code. R. 246; 266-267; 462). Nor did any coach or supervisor testify that they had heard of this code. The ALJ erred in recognizing the "code" as fact. (Op. 6 n.12). The actual facts show that Rabb's practice was to use silent hold mostly for activities far less conspicuous than leaving his desk to go to the bathroom. R. 154-155). In truth, Rabb's alleged history of "placing customers on silent hold to use the restroom" is un-enumerated and hazy. His "longstanding practice" is really not as "longstanding" or "transparent" as the ALJ pretends. (Op. 6, 12). The ALJ's conclusion that Rabb routinely engaged in the conduct for which he was discharged is not supported by the record.

The next part of the ALJ's first point, that Rabb's "longstanding practice" was tacitly accepted by coaches, is infected by the ALJ's misrepresentation of coaches as management. *See infra* Pt. IV.C.2.d. Because coaches are not supervisors or management, their alleged "tacit acceptance" of Rabb's "longstanding practice" is irrelevant. As a matter of law, non-supervisory coaches cannot bind DISH to their "tacit acceptance" without apparent authority to promulgate policy on behalf of management. *Pan-Oston Co.*, 336 NLRB 305, 305 (2001); *Suburban Elec. Eng'rs.*, 351 NLRB 1, 2 (2007). "Apparent authority exists only to the extent that it is reasonable for the third person [Rabb] dealing with the agent [coach] to believe that the agent is authorized. Further, the third person must believe the agent to be authorized." Restatement (Second) of Agency § 8 comment c. In determining whether apparent authority exists, "the Board will consider whether the statements or actions of an alleged employee agent were consistent with the statements or actions of the employer." *Pan Oston Co.*, 336 NLRB at 306. Here, it would not have been reasonable for Rabb to believe that coaches were authorized to change DISH's standing policy against call avoidance. *Id.*; *above* Pt. II.D-E. In fact, the record shows that Rabb did not believe his coaches were authorized to promulgate policies on behalf of DISH. R. 151). He testified that DISH's policies "were provided from above" the coaching level. *Id.* Thus, even if the GC tried to meet its burden of showing coaches had apparent authority to bind DISH to their "tacit acceptance," it would have failed. The "tacit acceptance" theory is irrelevant.

Fourth, even if the "tacit acceptance" theory were relevant, which it is not, it lacks record support. This theory was floated as part of the GC's case-in-chief, yet the GC did not call one coach--or even subpoena Barry Appelhans--to testify. Instead, the GC offered only secondhand accounts of what Rabb and other employees believed the coaches knew. It is well settled that conjecture as to a person's knowledge is not probative, let alone substantial evidence, of that

knowledge. *See Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, slip op. at 4 (2006) ("The General Counsel has the burden of proving that [the alleged discriminate] was engaged in protected activity, and that the Respondent was aware of the same. The General Counsel's case must rest on something more than speculation and conjecture."); *Reliable Disposal, Inc.*, 348 NLRB 1205, slip op. at 2 (2006) ("'Mere suspicion cannot substitute for proof' with respect to an essential element of the General Counsel's *Wright Line* burden of proof.") (quotation omitted). The ALJ's answer to this lack of evidence was to blame DISH for not calling any coaches to rebut Rabb's testimony that his coaches tolerated his "silent hold practices." (Op. at 5 n.10, 6 n.14, 8 nn.22-23). That just reverses the burden of proof. *Amcast, supra.* It is not a substitute for substantial evidence that DISH violated the Act.

b. *"Lack of Analogous Disciplinary Examples"*

The ALJ's second point hinges on his misrepresentations of Rabb's misconduct. The ALJ cited "the clear absence of discharges for placing callers on silent hold." (Op. at 12). The problem with this statement is that Rabb was not discharged simply for placing a caller on silent hold. As explained above, his discharge involved the improper use of silent hold at the end of a call in the presence of management, lying to the company and a caller, and rudely telling management he "went to take a piss"--after already being counseled for call avoidance and nearly terminated for "milking a call." R. 348-49, 358-59).

Many of the examples cited by DISH involve similar conduct. *See above* Pt. II.F; R. 372-375; Exhs. 5-14 (C. Luckner (unnecessary silent hold, willful misinformation to customers); L. Lewnard (unnecessary hold, rude to supervisor); B. Behm (staying on call without a customer); P. Williams (same); S. Bissell (same); K. Baash (same); J. Brown (same and making outbound calls without a customer)). Many of these employees evasive conduct was similar in length to Raab's conduct. Id. (S. Bissell (6 minutes); K. Baasch (same); P. William (10 minutes)).

However, these employees were discharged even though they did not lie to customers like Rabb did. Other employees were found to have spent longer periods of time abusing silent hold, but that is because their conduct was revealed through random, but comprehensive internal audits rather than flagrant displays in front of management. *See above* Pt. II.F; Op. at 7-8; R. 372-375; Exhs. 5-14 (B. Jones (caught by QA or Sales Integrity); C. Luckner (caught by Sales Integrity); J. Behm (caught by QA); J. Brown (same); K. Warrick (same)). Their deceptive and evasive conduct, however, is the same as Rabb's and Rabb's discipline was the same as theirs.

The ALJ violated well-established law when he unilaterally re-cast the conduct of other DISH employees according to his own subjective scale of misconduct. *See Neptco, Inc., supra*, 346 NLRB 18 (2005). For example, the ALJ concluded employees Luckner and Lewnard were not similarly situated to Rabb because they "engaged in gross insubordination, lied and created false accounts." (Op. at 12 n.34). But DISH considered Rabb insubordinate for repeatedly wandering from his desk with customers on hold and rudely telling a manager that he "went to take a piss." (GC Ex. 19). Rabb also lied--to the customer and the company--by camouflaging his break time as "silent hold." R. 348-49). Moreover, the fact that Rabb created false accounts of his time rather than just false accounts does not make his conduct dissimilar to that of Luckner or Lewnard. The ALJ simply discounted the severity of Rabb's conduct and replaced it with his own concept of insubordination and lying. That is reversible error. *Neptco*, 346 NLRB at 20.

Finally, the ALJ failed to consider the fact that Rabb abused silent hold in the presence of management and was caught by management. This automatically distinguishes all of the individuals whom the ALJ believes are "using silent hold" but not receiving discipline from coaches. *See Buhendwa, supra*, 214 F. App'x at 828; *above* Pt. IV.C.2.c.

c. *More False Comparisons to BREAK AUX*

The ALJ held that because "other ISAs routinely exceed their BREAK AUX allotment without disciplinary consequences, DISH's decision to fire Rabb for using silent hold to use the restroom instead of BREAK AUX is problematic." (Op. 12). What is truly problematic is the ALJ's improper insertion of his misguided business judgment and misrepresentation of Rabb's conduct. *See above*, Pt. IV.C.2.a-b. As explained above, BREAK AUX is not comparable to Rabb's misconduct; DISH's ISA's exceeded their BREAK AUX by only six percent (about two minutes); and the ALJ's comparative analysis violates the record and well established law.

d. *The "Methodology that DISH Used to Trap Rabb"*

The ALJ's fourth point is that "Evans and Gass misrepresented their intentions about trying to benevolently aid [Rabb], and, instead, sought to ensnare him." (Op. at 12). According to the ALJ, this "methodology … suggests invidious intent." In contrast to this hyperbole, the record reveals the following undisputed facts: DISH's management (including Evans and Gass) held a meeting in a glass walled conference room (R. 344-45, 436); the room was 15 feet away from Rabb's elevated workstation (R. 344); Rabb chose to put a caller on silent hold and leave his workstation (R. 99); his use of silent hold caused a red light to go off (R. 345, 439); silent hold is intended to be used to ask coaches questions (R. 347); employees had previously complained that it was hard to find coaches to assist them (R. 106, 198, 223, 346); the coaches were in the conference room at the time Rabb used silent hold (R. 345, 437); Gass left the conference room and went to Rabb's workstation R. 438; he waited two to three minutes for Rabb to return (R. 440); when Rabb returned, Gass asked if he was "prolonging calls" (R. 440-41); Rabb remarked that he went "take a piss." (R. 172, 346, 441).

It is difficult to understand how the ALJ found Rabb was "trapped." Entrapment requires one to be induced to act. No one induced Rabb to abuse silent hold in the presence of

management. No one induced Rabb to leave a customer on the line at the end of a call. No one induced Rabb to dismissively tell Gass that he was "taking a piss." While the ALJ refuses to believe that Gass left the conference room to see if Rabb needed help (even though silent hold is used to seek help), Gass' reasons for leaving the room are irrelevant without evidence that other employees used silent holding during the managers' meeting but were ignored.[6] There is no evidence that Evans or Gass sought to "ensnare" anyone.

In the end, the ALJ's conclusion that Evans and Gass "misrepresented their intentions about trying to benevolently aid [Rabb], and, instead, sought to ensnare him" misrepresents the record and misses the point. (Op. at 12). It is readily apparent that, once again, an "ALJ treated conflicting evidence ... with an almost breathtaking lack of evenhandedness. The employer's witnesses saw their testimony completely disregarded for the slightest of immaterial inconsistencies, while the union's witnesses survived even material contradictions." *Sutter East Bay Hospitals v. NLRB,* 687 F.3d 424, 437 (D.C. Cir. 2012). For example, the "key point" on which Evans and Gass supposedly discredited was that Evans stated "she sent Gass to aid Rabb because she was talking to Appelhans, and Gass contradictorily stat[ed] that Evans sent him because he was closest to the door." (Op. at 9 n.25). That is not a relevant, let alone key, point. Nor is it an accurate statement of the record. (Evans stated she sent Gass because Appelhans was "in the meeting" R. 344) and Gass said, "I think I was closer to the door, and the other reason is because there were no current supervisors on the floor." R. 438)). It is also a false contradiction,

[6] Although irrelevant in light of this larger point, the Board should take note of the ALJ's ridiculous conclusion that "if Gass truly wanted to help Rabb, he would have, instead, located him instead of waiting at his desk." When Gass went to check on Rabb, he "didn't see him anywhere" and it would have taken five minutes to navigate the "gigantic" sales floor. (Op. at 9; R. 431, 438). If the ALJ wanted to show that Gass lacked the "good faith" somehow required to act as a supervisor, he would not have required Gass to embark on a goose chase in lieu of waiting at Rabb's desk for what the ALJ himself deemed an insignificant amount of time. (Op. at 6).

as the witnesses' statements are reconcilable and, in any event, Gass cannot be held accountable for knowing what Evans was thinking.

Rabb's testimony, by contrast, is rife with caginess and actual contradictions such as his discredited "code word" for using the restroom on silent hold, (R. 153, 246, 266-67, 462); his claim that the "BS" he wrote on DISH's rules "doesn't stand for anything" (R. at 138; ER 16); his cagy uncertainty as to whether he received a final warning for "milking a call" (Compare R. 88 with R. at 171-72 & GC Ex. 11); his contradiction that he was not warned about silent hold abuse prior to his discharge (*Compare* R. 118 with R. 119); and his claim that he had to set up an installation date after generating an account number (*Compare* R. 173 *with* R. 271-72, 440).

e. *Red-Herring Intentions and Investigations*

The ALJ's fifth point is that if "Dish's intentions were truly evenhanded, it would have responded less drastically to someone using the restroom." (Op. at 12). This remark showcases the ALJ's misrepresentation of Rabb's conduct and substitution of his business judgment for that of DISH's management. The ALJ also criticized Evans because "without even taking the very obvious and fair step of asking his coaches whether they had accepted his conduct." *Id.* The alleged failure to investigate, however, is a classic red herring erroneously imposed upon DISH. *See Detroit Newspaper Agency*, 435 F.3d. at 310 (exposing alleged failure to investigate as a "red herring" and noting that absent a collectively-bargained agreement to the contrary, an employer "is not obliged to 'investigate' ... in any particular way"); *Sutter East Bay*, 687 F.3d at 434 (noting that "Board and circuit precedents reject the notion that [the employer] was obligated to investigate the [alleged discriminatee's misconduct] in any particular way"). Moreover, this is a case where the misconduct was displayed before management and admitted. It is not a case where an investigation may have been useful to resolve two conflicting versions of events. Finally, there is no evidence DISH investigated whether coaches condoned the conduct of any

other employee who was terminated. By requiring an investigation where none is required, warranted, or even precedented, the ALJ is demanding additional protections for Rabb. This yet another error of law. *See Framan Mechanical Inc.*, 343 NLRB 408, 415 (2004) ("[I]t is well established that the Act does not provide employees with immunity from otherwise legitimate employment decisions simply because of their [protected activity].").

f. *Recirculation of Manufactured Animus and "Escalated Protected Activity"*

The ALJ also declared that DISH would not have fired Rabb absent protected activity because Evans "sought to fire" Rabb twice before the March 8 [*sic*] incident "for solely [*sic*] breaching the solicitation policy" and "as a result, appears to have been keenly motivated to remove Rabb." (Op. 9). This analysis simply regurgitates the failed animus analysis used in the first phase of *Wright Line*, but it says nothing about the conduct for which Rabb was discharged. It is belies the undisputed record, which shows that Evans saved Rabb's job twice before the March 4, 2014 incident. *See above* Pt. IV.B.1. Moreover, even after these incidents, on March 4, 2014, Evans weighed-in against disciplining Rabb when he was caught abusing COACHING AUX by his coach because she trusted that he would listen. R. 342). However, just a few days later, Rabb abused Evans' trust by abusing silent hold--causing a customer to remain on call under false pretenses--directly in front of her and other managers, who he dismissively told he "went to take a piss." The ALJ inexplicably found "the only plausible explanation for this malicious intent was retaliation for [Rabb]'s protected activity." (Op. at 12). The ALJ is wrong.

The ALJ's final reason for concluding DISH failed to meet its *Wright Line* burden is "the close timing between his firing and escalation of his protected activity. As explained above, the ALJ's finding of close timing between Raab's protected activity and his discharge is manufactured. Rabb engaged in protected activity for over a year before his discharge.

D. The ALJ Erred in Concluding DISH Maintained an Unlawful Solicitation Policy.

According to the witnesses who testified in this case, DISH's working areas, particularly its retail sales floors, are hectic, "crazy and chaotic" places. (R. 162-63; 290-291; 299). ISAs can be called at a moment's notice and required to automatically receive calls. R. 215; 225). Their primary goal to is take inbound sales calls throughout the day and respond quickly and effectively to customers' needs in order to make a sale. R. 295). ISAs must remain actively engaged and responsive to customers. (R. 135). Their ability to navigate the workplace and quickly react to customer needs is essential under DISH's business model, where half of all new business comes from inbound sales calls. (R. 294).

In similar settings, the Board has reasonably held that an employer may ban solicitation in working areas, even during working time, because solicitation in such areas can easily disrupt customer exchanges and business. *See J.C. Penny Co., Inc.*, 266 NLRB 123 (1983) (holding that retail employers may lawfully prohibit employees from soliciting on the selling floor [working area] during the non-work time of employees because active solicitation in a sales area may disrupt a retail store's business); *Trump Marina Assocs. LLC*, Case No. 4-CA-35334, 2008 WL 2901586 (ALJ, Jul. 18, 2008) (same); *Blue Man Vegas, LLC*, Case 28-CA-21126, 2008 WL 2901591 (ALJ, Jul. 18, 2008) (same).

The ALJ takes the position that DISH's non-solicitation policy is *per se* illegal because it bans solicitation in work areas, even during working time. The Board's position on non-solicitation policies, however, is not that draconian. Nor should it be when the undisputed realities of DISH's workplace are considered. The ALJ ignored these realities, as well as the case law permitting similar non-solicitation policies in similar settings. In the setting of DISH's sales floor, the non-solicitation policy is reasonable for prohibiting disruptions to an already chaotic environment. This includes disruptive activity like that evidenced and complained about in this

case, where Rabb distributed distracting post-it notes in work areas, including an employee's desk. R. 337, 364-65). The policy does not chill protected activity because, as Rabb admitted, it allowed him to continue soliciting employees without distracting busy employees in working areas. (R. 92. The ALJ's Order regarding DISH's non-solicitation policy is a solution in search of a problem, and not appropriate for DISH's business.

E. The ALJ Erred in Holding Rabb Was Unlawfully Disciplined Under DISH's Solicitation Policy.

DISH excepts to the ALJ's conclusion that Rabb "received discipline under the unlawful Solicitation in the Workplace policy for engaging in protected concerted activity (i.e. soliciting co-workers to join his lawsuit challenging wage policy)" and "Dish made no showing that his activities interfered with his own work, the work of others, or Call Center operations."

First, as explained above, the ALJ is incorrect that the Solicitation in the Workplace policy is unlawful. Second, the ALJ again misrepresented the nature of the conduct for which Rabb was disciplined. Rabb was not disciplined for "soliciting" employees; he was disciplined for distributing post-it notes. R. 364-65; GC Ex. 15. DISH has a valid interest, recognized by the Board, in prohibiting the distribution of handouts on its sales floor. *See Beverly Enters.-Hawaii, Inc.*, 326 NLRB 335, 335 n.2 (1998) (summarizing differences between solicitation and distribution and reiterating that employers may prohibit distribution in working areas). While DISH's witnesses referred to Rabb's improper distribution generally as "solicitation," the ALJ and GC were wrong to seize upon this lay-person's description of Rabb's discipline as if it were a term of art. They are well aware of the legal difference between solicitation and distribution and should have evaluated Rabb's discipline under the appropriate standard. To be sure, Rabb had been soliciting employees for over a year, but was disciplined only when he began distributing notes and only after an employee complained about disruption at her workstation. R. 337.

The ALJ's conclusion that "DISH made no showing that Rabb's activities interfered with his own work, the work of others or Call Center operations" is hard to reconcile with the record or common sense. When as many as four employees feel compelled to take time out of their day to complain to management because of a co-workers distribution of literature, a reasonable person could safely conclude the distribution interfered with their work. R. 364-65). When one of those employees complained further that the distributed information was left at their workstation, a reasonable person would have to conclude that the distribution interfered with their work. R. 337) The ALJ's analysis does not reflect such reason.

V. CONCLUSION

In this case, the ALJ went to extraordinary lengths to determine that DISH violated the Act in spite of record evidence to the contrary. The ALJ's analysis relies on manufactured evidence and extremely misguided reasoning which violates well-established legal precedent in the arena of labor and employment discrimination. The ALJ's manifest errors and utter disregard for DISH's evidence, arguments and witnesses require that his decision be vacated and any remand directed to a different ALJ. For these and all the reasons described in this brief and accompanying motion, DISH respectfully requests that the Board grant its exceptions, vacate the ALJ's decision and dismiss the General Counsel's complaint.

Dated: May 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent Dish Network LLC's Exceptions to Administrative Law Judge Decision and Brief in Support of were filed via NLRB E-File and served to the following via electronic mail on this 7th day of May, 2015.

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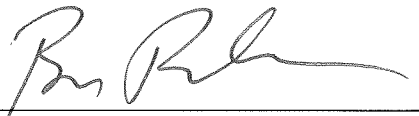

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